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# Memorandum

**To:** Commission Members  
**From:** Nick Livesay, Director  
**Date:** December 28, 2012  
**Re:** Draft Revisions to LUPC Rules, Chapter 4 – Rules of Practice

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At the December 14 Commission meeting in Farmington, we presented draft revisions to Chapter 4, Rules of Practice. Chapter 4 contains the procedural requirements governing advisory rulings, permit applications, zoning petitions, and rulemaking. The primary purpose of revising Chapter 4 is to establish the process governing requests for certification.

Based on feedback provided at the December 14 meeting and subsequent discussions with individual Commissioners, we have revised the proposed revisions to Chapter 4. A copy of the revised rulemaking is attached. This copy shows the changes proposed to the current version of Chapter 4. The attached redline document does not show the changes made to the prior version of the draft rulemaking that we discussed on December 14. The changes we have made since the prior draft are summarized in this memorandum. I will be prepared to discuss all these changes and more broadly discuss the proposed revisions to Chapter 4 at the January meeting.

## **I. Key Changes to Chapter 4 Rulemaking Since December 14, 2012**

We have made four primary changes to the proposed revisions to Chapter 4 since the last Commission meeting.

### **A. Final Agency Action**

First, we have modified which types of certification determinations qualify as final agency action. State law provides that a person proposing a development requiring Commission certification has two basic options. The person may (1) request certification from the Commission and then apply to the Department of Environmental Protection (DEP) for a Site Law permit, or (2) request certification from the Commission and simultaneously apply to the DEP for a permit. As a result, all certification determinations fall into one of the following four categories:

- i. Approval of certification, Site Law permit application is pending with DEP
- ii. Denial of certification, Site Law permit application is pending with DEP
- iii. Approval of certification, no pending Site Law permit application
- iv. Denial of certification, no pending Site Law permit application

In the prior draft of the Chapter 4 revisions, none of the four categories of certification determinations qualified as final agency action. This has been changed in the current version. As currently proposed, if the Commission were to deny a request for certification and there were no companion Site Law permit application pending at the time of the denial (*i.e.*, if there is a category iv certification determination), the Commission's denial of certification would be final agency action. This means the certification determination could be appealed to Superior Court. This modification is intended to avoid the need for the DEP to take some form of action, when it has no pending permit application on which it could readily act, in order to enable the person who was denied certification to seek judicial review.

With regard to each of the other three categories of certification determinations, a person aggrieved would be able to seek judicial review through appeal of the DEP Site Law permitting decision that would incorporate the certification determination. This would be true even if a person wished to challenge a certification approval issued at a time when a companion Site Law permit application had not yet been filed with DEP (*i.e.*, a category iii certification determination). This is because the proposed development could not be constructed without a Site Law permit, and the DEP could not issue a Site Law permit without incorporating the certification into the permit. As a result, a person aggrieved could seek judicial review of the certification determination through an appeal of the Site Law permit containing the certification.

In sum, in the revised version of Chapter 4 that is attached, certification determinations in categories i, ii, and iii would not be final agency action; certification determinations in category iv would be final agency action. Multiple changes to Chapter 4 were made to achieve this result.

## **B. Acceptance of a Request for Certification as Complete for Processing**

Second, several Commissioners have indicated that Chapter 4 is confusing in that (a) the acceptance of an application for processing and (b) the determination that an application is complete are treated as separate events but said to occur at the same time for everything but expedited wind energy development. The language creating this dichotomy was added to Chapter 4 in 2011 in response to legislation setting specific permitting time frames for wind power development in expedited permitting areas. We carried this same language forward and applied it to certifications in the draft revisions we discussed on December 14.

In the revised version the proposed rule that is attached to this memorandum, this confusing language has been modified throughout Chapter 4. As revised, the review time frames set out in both statute and rule begin when the Commission accepts an application, petition, or request for certification as "complete for processing." Accepting filing with the Commission as "complete for processing" is a single event. When a filing is complete for processing, this means the Commission has sufficient information to start its review. The Commission still may request additional information and still may deny the application, petition, or request for certification on the grounds that it has not been provided sufficient information to issue an approval.

The Commission and an applicant have some latitude to reset review time periods if new information is submitted or if a project is changed. The scope of this latitude depends on the type of project, with specific statutory limits applying to certain wind energy development. The confusing language currently in Chapter 4 was drafted to respect these differences, specifically regarding wind energy development. As revised, Chapter 4 continues to respect these differences, but with revised language. Notably, the limitations on the ability to reset the start date for Commission permit review for wind energy development in expedited permitting areas is retained. Projects that would fall into this category and required Commission permitting are those that are not grid-scale. Grid-scale wind power projects are permitted by the DEP. Commission certification determinations associated with grid-scale wind power projects will be processed in the same manner as other requests for certification.

### **C. Use of Cross-references to Shorten Section 4.11**

Third, as previously drafted the new Section 4.11, which contains the procedural requirements for requests for certification, contained several lists that had been copied for other portions of Chapter 4. For example, Section 4.11 contained lists identifying (a) who must receive notice when a request for certification is filed, (b) who must receive notice of a public hearing associated with a request for certification, and (c) the content of public notices. Each of these lists was copied from other portions of Chapter 4.

In response to comments we have received, to shorten Section 4.11 we have removed these lists and cross-referenced the other portions of Chapter 4 where the lists may be found.

### **D. Use of the Term Commission to Refer Both to the Commission and Commission Staff**

In many parts of Chapter 4 the Commission and staff are referred to separately. In some places, however, the term “Commission” is used by itself with apparently differing intents. In some places the term Commission is used by itself with the intent that it captures staff and in other instances the term is used by itself with no intention of capturing staff. To avoid potential confusion, the revised draft of Chapter 4 uses the term Commission to refer to the Commission and, where staff have delegated authority, to the staff as well. Only where staff needs to be referenced separately, for example, in the provisions dealing with the appeal of staff decisions, is the term staff used. This is not intended to alter staff’s role in any way, but rather to use terms consistently throughout the rule. This is an administrative clean-up presented for your consideration.

## **II. Section-specific List of Changes to Chapter 4 Rulemaking Since December 14, 2012**

The following is a section-by-section list of the changes to Chapter 4 since the last Commission meeting. This list does not capture every change. For example, the capitalization of a word is not noted. The list, however, is nearly all-inclusive.

- Sec. 4.01 Scope of Rules – amended to clarify that the term Commission includes Commission staff where the Commission has delegated authority to staff to act on its behalf. Relatedly, throughout the chapter reference to staff has been changed to the Commission, unless distinguishing between the Commission and staff is important (e.g., Section 4.02 dealing with advisory rulings, which are only issued by staff, or Section

4.04(11) dealing with appeals of staff decisions to the Commission). These changes do not alter the scope of staff's responsibilities, but are intended to (i) eliminate the need to refer to the "Commission or staff," which can be cumbersome from a drafting perspective, and (2) eliminate potential confusion where the term "Commission" currently is used by itself, but is intended to capture staff as well (e.g., in Section 4.03(3) where staff make TRI determinations as part of exercising delegated authority to review certain permits, although staff's authority to do so not expressly stated). In short, the goal is to be consistent in the use of our terms within Chapter 4. As noted above, this set of revisions is intended as a clean-up of the current rule and not as a substantive amendment. The purpose of these revisions could be noted in the basis statement for the revisions.

- Sec. 4.03(2) Signatures – amended to replace reference to “notice of intent to develop” with reference to “request for certification.” The previously referenced notice of intent to develop is a statutorily required component of a request for certification. This change is intended to ensure consistent use of terminology throughout Chapter 4.
- Sec. 4.03(6) Fee – amended to add a new final sentence specifying that any fee, including a fee associated with a request for certification, must be provided to the Commission. This is intended to avoid payment of a certification-related fee to the Department of Environmental Protection.
- Section 4.03(8) Acceptance of Applications – amended to eliminate a confusing distinction between the date an application is accepted as complete and accepted for processing. This distinction followed a recent amendment of Chapter 4 in response to legislation providing for expedited permitting of wind power projects in certain areas. Amendments to this section also are proposed in order to reflect that the Commission – post LD 1798 – will no longer be permitting “grid-scale wind energy development.”
- Section 4.04(4)(b) – amended to correct a prior omission regarding public notice of requests for variance. As amended, the section provides that the Commission “shall provide notice of the pending application by regular mail to all persons owning or leasing land within 1000 feet of the proposed project as shown in the records of Maine Revenue Services or the applicable plantation or municipality.” The added language presently is used throughout Chapter 4.
- Sec. 4.04(10)(b)-(d) Procedures and Time Limits for Issuing a Permit Decision – amended three paragraphs in this section to be consistent with language changed in Section 4.03(8) addressing the acceptance of applications as complete for processing. Further, amendments to paragraph (d) were made to reflect that the changes in LD 1798 governing the Commission’s permitting authority over wind energy development and to delete an improper reference to “paragraph A.” This language referencing paragraph A appears to have been mistakenly cut and pasted from prior statute and never should have been included in Chapter 4.
- Sec. 4.07(4) Final Action – amended by replacing the prior reference to “This section . . .” with “Section 4.07 . . .” This non-substantive edit is intended to eliminate any possible ambiguity.

- Section 4.11(1)(b) – amended as part of final agency action edits discussed above.
- Section 4.11(1)(c) – amended to specify, in more strait forward language, that a certification determination may contain terms and conditions. Amendments to this section also eliminate, consistent with the revisions to Section 4.11(1)(b), the language indicating that all certification determinations will be issued solely to the DEP. (As revised, Section 4.11(1)(b) provides that a denial of a request for certification, when there is no Site Location of Development permit application pending with the DEP, will be issued both to the DEP and the person proposing development.)
- Section 4.11(d) – amended the beginning of this paragraph as follows: “The Commission may conduct its certification review and ~~issue~~provide its determination ~~to the Department~~ as a single certification determination or in two parts.” This edit is consistent with the revisions to Section 4.11(1)(b) that specify to whom a certification determination is issued.
- Section 4.11(1)(e) – amended to add clarity. This paragraph addresses title, right, or interest in the certification context. When a person requesting certification simultaneously applies to the DEP for a Site Law permit, DEP will make the TRI determination. When a person requesting certification elects to seek certification before applying for a Site Law permit, the Commission has the option of (a) deferring a TRI finding to the DEP and issuing a certification determination conditioned on the DEP finding, in a future permitting proceeding, the person has sufficient TRI, or (b) addressing TRI. By having the ability to address TRI, the Commission has the option of avoiding a time-intensive certification review.
- Section 4.11(1)(f) – amended as part of final agency action edits discussed above.
- Section 4.11(1)(g) – added as part of final agency action edits discussed above.
- Section 4.11(2) Acceptance of Requests for Certification [generally] – amend to eliminate confusing language that a request for certification is determined to be complete the same day it is accepted for processing. The section now uses a single term, “complete for processing.” The modification to this section is similar to the modification proposed to Section 4.03(8).
- 4.11(2)(a)(iv) – amend, consistent with amendments to Section 4.11(1)(e), to allow the Commission to require submission of TRI documentation if a person requests certification prior to filing a Site Law permit application.
- Section 4.11(2)(d) Expedite Wind Energy Development Application Complete – deleted this paragraph to reflect the fact that the Commission will review and process requests for certification of “expedited wind energy development” in the same manner it reviews and processes other requests for certification. (“Expedited wind energy development” is defined in statute as the size project now subject to DEP permitting.) Previously, when the Commission was responsible for permitting this type of wind power project, a statutorily set timeline applied to the Commission’s review. This timeline does not apply

to certifications, but still applies to wind power development in the expedited permitting area that is not grid-scale development and still subject to Commission permitting.

- Section 4.11(4) Notice of Intent to File a Request for Certification – amended to simplify the language and remove the list of persons that must receive notice of requests for certification by cross-referencing the existing notice list for permit applicants in Section 4.04(4)(c)(i) through (vi).
- Section 4.11(4) Notice of Intent to File a Request for Certification – removed what was formerly the second to last paragraph that stated: “The staff may require as part of any request for certification that the person making the request submit the names and addresses of all persons owning or leasing land within 1000 feet of the project.” Since the person requesting certification has the obligation to provide the notice, this language is not needed. In deleting this paragraph it is important to note that the Commission retains the ability to require a person requesting certification to demonstrate that the public notice requirements in Section 4.11(4) have been satisfied.

Additionally, the final paragraph of Section 4.04(4) has been modified to clarify that regardless of whether the person requesting certification follows the DEP or LUPC public notice requirements, the Commission may, at its expense and discretion, opt to provide additional notice.

- Section 4.11(6)(c) – amended to simplify language.
- Section 4.11(7) Notice of Hearings on Requests for Certification – amended to eliminate lists associated with notice requirements. Instead, the lists, which also appear in Section 4.04(6), are now cross-referenced. Additionally, language was added clarifying that as an alternative to the Commission providing the public notice required for a hearing, the Commission may require that the person requesting certification to provide the notice.
- 4.11(8) Content of Notice – amended to eliminate the list of components of a public notice. Instead, the list, which also appears in Section 4.04(7), is now cross-referenced.
- Section 4.11(10) Comment Period Without Hearing – amended to clarify that the timeline trigger in this section is now the Commission accepting a request for certification as complete for processing. In addition, this section has been amended to clarify that the Commission may complete the first part of a certification determination – evaluation of whether the proposed use is allowed in the subdistrict(s) in which it is proposed – in less than 20 days. This is consistent with the timeline in the MOU with the DEP that contemplates a use determination typically being made within 15 business day of a request being accepted as complete for processing.
- Section 4.11(11) Procedures and Time Limits for Issuing a Certification – amended paragraphs (a), (b), and (c) to simplify the language. One way this was done was by moving the language in both paragraphs (a) and (b) concerning the ability of the Commission to attach terms and conditions to a certification determination to Section 4.11(1)(c). Additionally, these paragraphs were amended so that the review timelines

begin with the Commission accepting a request for certification as “complete for processing.”

- Section 4.11(12)(b) – amended as part of final agency action edits discussed above.

### **III. Next Steps and Recommendation**

Throughout the development of the revisions to Chapter 4, we have consulted with the Attorney General’s office and benefits from Assistant Attorney General review of prior drafts. Due to holiday and vacation schedules, the Attorney General’s office has not yet reviewed the attached draft. As a result, staff recommends that the Commission post the attached Chapter 4 rulemaking for public comment after incorporating any non-substantive edits recommended by the Office of the Attorney General. If the Office of the Attorney General identifies any substantive issue, staff will address those issues in a further revised draft for Commission review prior to posting for public comment.